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**IN THE  
COURT OF APPEALS OF INDIANA**

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DANNY K. WHEELER,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 30A05-0802-CV-56

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APPEAL FROM THE HANCOCK CIRCUIT COURT  
The Honorable Robert D. Culver, Judge  
Cause No.30C01-0504-PL-234

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**September 24, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

### Case Summary and Issue

In this eminent domain proceeding, Danny Wheeler appeals the trial court's order allowing the State of Indiana to withdraw its exceptions to an appraisal of the condemned property. On appeal, Wheeler raises two issues, which we consolidate and restate as whether the trial court abused its discretion when it allowed the State to withdraw its exceptions. Concluding that the trial court did not abuse its discretion when it allowed the State to withdraw, we affirm.<sup>1</sup>

### Facts and Procedural History

On April 6, 2005, the State filed a complaint to appropriate a portion of Wheeler's property for a highway improvement project on State Road 67 in Hancock County. The State had previously offered Wheeler \$125,425 for the property, but he rejected that offer. On August 22, 2005, the court-appointed appraisers filed their report, assessing the fair market value of the property at \$161,100, which was calculated as follows: \$59,600 for the condemned property, \$1,500 for improvements to the land, \$99,850 for damages to the residue as a result of the condemnation, and \$150 for additional damages as a result of the proposed improvements to the highway. On September 12, 2005, the State filed exceptions to the appraisers' report, alleging that the report's itemized fair market values were "too high" and demanding that the matter proceed to a jury trial. Appellant's Appendix at 25. On January 17, 2007, the trial court conducted a pre-trial conference and entered a pre-trial order. In its pre-trial order, the trial court scheduled a jury trial for July 31, 2007, and ordered, among other things, that the parties participate in mediation on or

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<sup>1</sup> Because we decide the issue on appeal in favor of the State, we deny as moot its motion to strike portions of Wheeler's reply brief.

before May 1, 2007, that discovery conclude thirty days before trial, and that any independent appraisal reports be exchanged at least sixty days before trial. The trial court also stated in its order that “[t]he parties believe that all amendments to the pleadings and all parties in this action have now been joined.” Id. at 47.

On April 30, 2007, the parties participated in mediation, but were unable to reach a compromise. At the mediation, the State represented that it was contemplating filing a motion to withdraw its exceptions to the appraisers’ report, which, if granted, would end the litigation and result in the trial court awarding Wheeler \$161,100. To foreclose this possibility, Wheeler filed exceptions on May 7, 2007, but the trial court denied that motion because the exceptions were not filed within the twenty-day time period required by Indiana Code section 32-24-1-11(a). On June 7, 2007, the State followed through on the representation it made during mediation by filing a motion to withdraw its exceptions. On June 14, 2007, having not received a ruling on its motion to withdraw, the State filed its forty-five day settlement offer as required by Indiana code section 32-24-1-12, stating that it would pay Wheeler \$161,100 “to settle all claims in this case.” Id. at 95. On June 20, 2007, Wheeler filed a counteroffer, stating that he would settle the case for \$250,000 plus \$25,000 in attorney fees. However, Wheeler’s motion was mooted because, on June 19, 2007, the trial court granted the State’s motion to withdraw and ordered that the State pay Wheeler \$161,100 for the property. On July 5, 2007, Wheeler filed a motion to correct errors. On November 7, 2007, the trial court conducted a hearing on Wheeler’s motion, which was deemed denied due to the trial court’s failure to rule on the motion within thirty days from the hearing. Wheeler now appeals.

## Discussion and Decision

### I. Standard of Review

The decision to grant or deny a motion to withdraw exceptions is entrusted to the trial court's discretion, and a reviewing court will reverse only if the trial court has abused its discretion. See State v. Bishop, 800 N.E.2d 918, 922 (Ind. 2003). Abuse of discretion occurs if the trial court's decision "is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn from those facts and circumstances." Id. (quoting Lucre Corp. v. County of Gibson, 657 N.E.2d 150, 152 (Ind. Ct. App. 1995), trans. denied, cert. denied, 519 U.S. 950 (1996)).

### II. Propriety of Trial Court's Decision

Wheeler argues the trial court abused its discretion when it granted the State's motion to withdraw its exceptions. Indiana Code chapter 32-11-1 governs eminent domain proceedings, and this court has provided the following rough outline of how those proceedings unfold:

First, when the complaint is filed a notice is issued and served on the landowner requesting his appearance at a stated time to show cause, if any he have, why the land should not be appropriated. If he believes he has cause he may file "objections." If no objections are filed, or if those filed are overruled, an order of appropriation is entered and three appraisers are appointed and ordered to file their report appraising the damage to the landowner resulting from the appropriation.

Second, within twenty days of the date the report of appraisal is filed, either or both parties may file "exceptions" to the appraisal. If timely filed, exceptions raise the issue of the amount of the landowner's damages.

That issue is tried de novo by the judge, or by a jury if timely requested. If no exceptions are timely filed the appraisers' award becomes final.

Daugherty v. State, 699 N.E.2d 780, 781-82 (Ind. Ct. App. 1998) (quoting Lehnen v. State, 693 N.E.2d 580, 581-82 (Ind. Ct. App. 1998) (citation and footnotes omitted), trans. denied), trans. denied.

Wheeler’s appeal concerns the second part of the proceedings described in Daugherty, specifically the filing and withdrawal of exceptions to the appraisers’ report. The statute governing exceptions to the appraisers’ report does not explicitly allow a party to withdraw them as a matter of right, but does state in a “catch-all” provision that “[t]he court may make orders and render findings and judgments that the court considers just.” Ind. Code § 32-24-1-11(b). Consistent with subsection (b), our supreme court has stated that a trial court “should allow the withdrawal of exceptions except in instances where injustice would result.” Bishop, 800 N.E.2d at 922 (quoting Daugherty, 699 N.E.2d at 782-83). In analyzing the propriety of a trial court’s decision to grant or deny the withdrawal of exceptions, a reviewing court should consider the following “non-exclusive” list of factors:

[1] the length of time between the filing of the appraisers’ report and the motion to withdraw, [2] whether the withdrawing party is attempting to do so on the eve of the trial, [3] whether the withdrawing party and trial court have been put on notice of the other party’s dissatisfaction with the report, either that be through the filing of belated exceptions or otherwise, and [4] the extent of trial preparation which has already occurred, including the securing of expert witnesses and the extent of discovery.

Id. (quoting Daugherty, 699 N.E.2d at 783).

We start our analysis by noting that the third factor clearly favors denying the State’s motion to withdraw because both the State and the trial court were aware of Wheeler’s dissatisfaction with the appraisers’ report by May 7, 2007, at the latest, which

is the date Wheeler filed his belated exceptions.<sup>2</sup> The remaining factors, however, do not necessarily favor denial of the motion to withdraw. Regarding the first factor, the length of time between the filing of the appraisers' report and the motion to withdraw, we note that although one year and nine months may seem like a long time at first glance (the appraisers' report was filed on August 22, 2005, and the State filed its motion to withdraw on June 7, 2007), the State apparently did not receive the appraisal from Wheeler's expert or Wheeler's personal opinion as to the fair market value of the property until two days before the April 30, 2007, mediation. Our supreme court has stated that "[f]iling a request to withdraw after two years and four months may be understandable in cases where a party conducted discovery and attempted mediation then realized that the appraisers' amount was reasonable," Bishop, 800 N.E.2d at 923, and it appears that similar events occurred here, namely, that the State considered Wheeler's position at mediation and concluded the appraisers' amount was reasonable.<sup>3</sup>

Similarly, we cannot say that the second and fourth factors favor denial. Regarding the second factor, whether the motion to withdraw was filed on the eve of trial, we note the motion was filed over six weeks before the start of trial and over two weeks before the discovery deadline. Such a filing clearly is not made on the eve of trial.

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<sup>2</sup> We recognize both the State and the trial court could have known of Wheeler's dissatisfaction earlier, for example during the January 17, 2007, pre-trial conference or shortly after the April 30, 2007, mediation (assuming the trial court received word of the parties' final offers), but the record does not disclose what transpired at these meetings, and any conclusion that the State and the trial court were on notice as of these dates would be based more on an assumption than a reasonable inference.

<sup>3</sup> We recognize that the State's decision may have been motivated more by strategic concerns than by a genuine belief that the appraisers' report represented the reasonable price of the property. That is, the State may have concluded during mediation that Wheeler stood a good chance of convincing a jury that his property was worth more than \$161,100, and simply sought to limit its exposure by filing a motion to withdraw its exceptions. However, both inferences as to the State's motivations are reasonable ones, and we therefore cannot say that the State's delay necessarily favors denying its motion to withdraw.

Regarding the fourth factor, the extent of trial preparation that has occurred, although Wheeler had retained an expert appraiser, see id. (observing that retention of expert witnesses may favor denying a motion to withdraw), Wheeler's counsel indicated during the November 7, 2007, hearing on the motion to correct errors that he still had to conduct depositions, see transcript at 22 (Wheeler's counsel stating that "we had set depositions in this case for approximately a week after . . . the point and time [sic] when the Court . . . granted the State's motion [to withdraw its exceptions] and entered judgment i[n] this case, so discovery was in fact ongoing"). Moreover, the record does not indicate that extensive discovery occurred or that Wheeler incurred significant attorney fees and expenses prior to the motion to withdraw. Cf. Bishop, 800 N.E.2d at 923 (concluding the trial court did not abuse its discretion in denying the State's motion to withdraw in part because the defendants stated "that they had exchanged interrogatories, retained two expert witnesses and 'spent several tens of thousands of dollars on attorneys' fees, appraisers and other expenditures.'" (citation omitted)). If anything, the record indicates that from December 2005 to May 2006, Wheeler did not conduct any discovery, as the State's counsel made this claim during the hearing on the motion to correct errors without rebuttal from Wheeler's counsel. See Tr. at 14 (The State's counsel stating "the case stayed dormant for . . . quite a period of time . . . and it was . . . a period of time from December of 2005 to May of 2006 and [Wheeler] made no efforts to move the case to trial, didn't do any discovery[, nothing]").<sup>4</sup>

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<sup>4</sup> We also note that one other factor not applied in Bishop is worth mentioning here, namely, the presence of a pre-trial order. Prior to Bishop, the prevailing view was that if the trial court entered a pre-trial order, that order controlled and a party could not withdraw its exceptions absent an attempt to first modify the pre-trial order, see Pub. Serv. Co. of Ind., Inc. v. Rounder, 423 N.E.2d 666, 667 (Ind. Ct. App. 1981); State v. Blount, 154 Ind. App.

This case further demonstrates that the current procedures for filing exceptions and withdrawals to the appraisers' report often result in an elevation of form over substance. Indeed, we reiterate our supreme court's admonition in Bishop, which was originally made in Daugherty, that "parties who wish to insure a trial on the merits should file their own timely exceptions, and those who file should recognize that they may not be permitted to withdraw those exceptions and terminate litigation which they have begun." 800 N.E.2d at 922. This is a very difficult choice to make in the early stages of an eminent domain proceeding, and we add our own observation that the legislature could prevent forcing such a difficult choice on the parties by extending the time they have to file exceptions. Such an approach would allow the parties to determine, through independent appraisals or consultation with expert appraisers, whether the appraisers' report reasonably represents the property's fair market value. Our task today, however, is to determine whether the trial court abused its discretion when it granted the State's motion to withdraw, and application of the factors outlined in Bishop does not convince us Wheeler has demonstrated that the trial court's decision was clearly against the logic and effect of the facts and circumstances before it. Thus, it follows that the trial court did not abuse its discretion.

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580, 584, 290 N.E.2d 480, 483 (1972), presumably on a theory that such a view was consistent with the rule governing pre-trial orders, see Ind. Trial Rule 16(J) (stating that a pre-trial order "when entered shall control the subsequent course of action, unless modified thereafter to prevent manifest injustice"). Our supreme court's decision in Bishop obviously abandoned this bright-line rule, but the language of the Bishop opinion suggests that the presence of a pre-trial order may still be a relevant factor in determining the propriety of a trial court's decision to grant or deny a motion to withdraw. See 800 N.E.2d at 922 (describing the factors initially listed in Daugherty as not constituting a "four-part test," but merely a "non-exclusive list of circumstances"). Regardless, even if we concluded that the trial court's pre-trial order favors denial of the State's motion to withdraw, such a conclusion does not render the trial court's decision an abuse of discretion because application of most of the factors discussed above supports the trial court's decision to grant the State's motion.



### Conclusion

The trial court did not abuse its discretion when it granted the State's motion to withdraw its exceptions to the appraisers' report.

Affirmed.

BAKER, C.J. and RILEY, J., concur.